ORIGINAL

No. 83-6583

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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SUPREME COURT, U.S.

CHARLES KENNETH FOSTER,

Petitioner,

v.

CHARLES G. STRICKLAND, JR., Warden, Florida State Prison; LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections; and JIM SMITH, Attorney General, State of Florida,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

ISSUE I

WHETHER PETITIONER WAS AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL LEVEL.

ISSUE II

WHETHER THE CIRCUIT COURT OF APPEALS, ELEVENTH CIRCUIT, HAVING ISSUED AN OPINION WHICH DISPOSED OF AN ISSUE NOT RAISED BELOW, WAS UNABLE TO WITHDRAW A PORTION OF THAT OPINION *sua sponte*.

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OPINION BELOW

Petitioner's designation of the opinion below is correct and acceptable to respondent.

JURISDICTION

Petitioner's jurisdictional allegation is acceptable to respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the constitutional and statutory provisions involved as set forth on p. 2 in the petition for writ of certiorari.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case as found in the petition for writ of certiorari. However, respondent disagrees with the statement of facts to the extent that petitioner states that defense counsel had significant doubts as to the competence of Charles Kenneth Foster to proceed to trial. On pp. 56, 57 of the habeas corpus transcript in the District Court, defense counsel expressed his belief that according to the Florida test for competency, Mr. Foster was competent to stand trial.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Respondent does not disagree with petitioner's statement concerning how the federal questions were raised below.

REASONS FOR NOT GRANTING THE WRIT

ISSUE I

WHETHER PETITIONER WAS AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL LEVEL.

Petitioner urges this Court to review the decision of the Eleventh Circuit Court of Appeals on the allegation that Virgil Mayo, defense counsel, failed to produce evidence which, if presented, would have mandated the finding that a mitigating circumstance was proven.

We must approach this allegation on two levels. First, petitioner's claim fails if the disputed evidence cannot be shown to have required, as a matter of law, the finding of a mitigating circumstance. It is because this Court does not sit to review the sufficiency of evidence to establish a mitigating circumstance, that this is true. Eddings v. Oklahoma, 455 U.S. 104 (1982). Secondly, is counsel's failure to present this evidence ineffective assistance of trial counsel, or is it a tactical choice made by experienced counsel now examined by the finely ground lenses of hindsight?

However, it must initially be stated that petitioner here merely restates the argument made before the lower forum, and has failed in any way to establish that this case presents a substantial federal question which merits the exercise of this Court's jurisdiction. The allegation asks this Court to examine the evidence to determine whether the Circuit Court of Appeals correctly found that petitioner received effective assistance of counsel. Rule 17 of the rules of this Court, and Ross v. Moffitt, 417 U.S. 600, 616-617 (1974), makes it clear that such review is not the function of the writ of certiorari. See also: Stern and Gressman, Supreme Court Practice (5th Ed. 1978), pp. 254-317.

The evidence which petitioner alleges would certainly have proven a mitigating circumstance, was considered by the District Court and the appellate court, and both rejected petitioner's argument. It must be stated that petitioner had specifically instructed his attorney not to present a defense which might result in a commitment in a mental hospital. Foster v. Strickland, 517 F.Supp. 597, 602 (N.D.Fla. 1981). Additionally, Foster repeatedly stated his intention to "walk or burn." Id. at 602. Given these decisions, which three doctors had concluded Foster was competent to make, defense counsel had little choice. However, an examination of the District Court's remarks concerning this allegedly probative evidence is helpful.

> If Mayo introduced Foster's medical history and testimony of his relatives as Foster says he should have, a great deal of highly prejudicial evidence would have come along. The jury would have learned that Foster once took his mother's car from her at knifepoint; that he raped two women, one of whom was his sister-in-law; that he had been arrested a number of times for violent crimes; and that he once told his mother he was going to kill his little brother and cook him for supper.

Id. at 605. More importantly however, the District Court found that the decision not to present this evidence was a tactical one, within the discretion of counsel, and made with the intent to present the best chance of a jury recommendation of life.

> [Mayo] felt the psychiatric mitigating circumstances would be difficult for a unsophisticated Bay County jury to understand and likely to be ignored as technicalities by a jury outraged by the murder's brutality. Consequently he focused upon seeking mercy. To that end he put Foster's ex-wife on the stand. He felt she would evoke the jury's sympathy while presenting evidence from which he could also argue the psychiatric mitigating factors.
>
> * * *
>
> . . . Mayo's decision to try talking the jury into a life sentence through use of emotional testimony, psychiatric testimony, and a good old fashioned appeal to mercy was reasonable.

Foster, 603, 605.

Petitioner's allegation that this disputed evidence unmistakably demonstrated a mitigating circumstance, is clearly without merit. However, the state will address the second prong of petitioner's claim: that the failure to present this evidence is ineffective assistance of counsel per se.

Petitioner has cited no case, nor could he, to support his claim that counsel may be found ineffective by the act of choosing to present one type of mitigating evidence over another. Petitioner has abandoned his earlier claim that counsel did not know about this evidence. However, an examination of one act or omission of counsel is not the appropriate focus of a claim of ineffective assistance of counsel. A claim that due process has not been afforded a petitioner because of his counsel's ineffectiveness must be examined by a totality of the circumstances. See Gideon v. Wainwright, 372 U.S. 335, at 339 (1963). It was on such an analysis, that the District Court and the appellate court below found that defense counsel's representation of petitioner was effective assistance of counsel. Petitioner has failed to present a federal question to this Court. Thus, this Court should decline to accept jurisdiction.

ISSUE II

WHETHER THE CIRCUIT COURT OF APPEALS, ELEVENTH CIRCUIT, HAVING ISSUED AN OPINION WHICH DISPOSED OF AN ISSUE NOT RAISED BELOW, WAS UNABLE TO WITHDRAW A PORTION OF THAT OPINION sua sponte.

Petitioner alleges that the Eleventh Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a), Rules of the Supreme Court. This allegation is grounded upon a claim that once the lower court issued its opinion addressing an issue not raised on appeal, it was "no longer free to undo this exercise of discretion at its whim." (Petition for Writ of Certiorari, at p. 34.)

Such a rule, if implemented, would make every opinion final upon its being issued. No individual may seriously contest the rule by which parties may request a rehearing, and upon such consideration a modification of the opinion may be had.

However, the issue was raised by a petition for rehearing, but was disposed of on the court's own motion. The petition for rehearing is provided herewith as respondent's appendix. In its petition for rehearing, respondents made it clear that under this court's decision in Barclay v. Florida, ____U.S.____(July 6, 1983), the opinion of the Eleventh Circuit could not stand. That the lower court withdrew the offending portion of the decision without reaching the question of conflict with Barclay, does not cause the withdrawal to be less appropriate. Clearly, if it were not withdrawn for the reasons stated, it would have been withdrawn for the reason that it conflicts with Barclay. The Eleventh Circuit reversed the sentence of death imposed by the State of Florida on the ground that a Florida procedural rule had been violated. The opinion held that because of the penalty involved; death, the state's procedural protection became cloaked with the status of a constitutionally protected right. In Barclay, while this Court found that a violation of state law had occurred, it nonetheless found that review of Barclay's death penalty was limited to whether the findings "are so unprincipled or arbitrary as to somehow violate the United States Constitution." The Eleventh Circuit's holding that the state's procedural protection became cloaked with the status of a constitutionally protected right, could not stand in light of Barclay.

Further, the Eleventh Circuit Court of Appeals held "[t]here is substantial evidence on the record that would have allowed the trial judge to impose a life sentence. . .." Eddings v. Oklahoma, 455 U.S. 104 (1982), specifically holds

that an analysis of the weight or sufficiency of the state's evidence is not appropriate. "We do not weigh the evidence for them." Id. at 117. Thus, there was a second reason why the Eleventh Circuit's opinion was erroneous.

In summary, it is quite clear that the Eleventh Circuit was totally within its discretion to withdraw that portion of the opinion which had not been raised on appeal. Petitioner has again failed to present this Court with a federal question. This Court should decline to accept jurisdiction.

CONCLUSION

For the above and foregoing reasons, respondent, Charles G. Strickland, Jr., respectfully requests this Honorable Court decline to accept certiorari jurisdiction.

Respectfully submitted:

JIM SMITH
Attorney General

By: _____
GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR RESPONDENT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to Mr. Richard H. Burr, III, 224 Datura Street -- 13th Floor, West Palm Beach, Florida 33401, Attorney of Record for Petitioner, and to Mr. Steven L. Seliger, 229 E. Washington Street, Quincy, Florida 32351, of Counsel for Petitioner, by U.S. Mail, this 20th day of April, 1984. I further certify that all parties required to be served have been served.

_____
GREGORY C. SMITH
Assistant Attorney General

ORIGINAL

No. 83-6583

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES KENNETH FOSTER,

Petitioner,

v.

CHARLES G. STRICKLAND, JR., Warden, Florida State Prison; LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections; and JIM SMITH, Attorney General, State of Florida,

Respondents.

A P P E N D I X

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Case No. 81-5734

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CHARLES KENNETH FOSTER,

Petitioner-Appellant,

-v-

CHARLES G. STRICKLAND, JR., Warden, Florida State Penitentiary; LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections; and JIM SMITH, Attorney General, State of Florida,

Respondents-Appellees.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: Barclay v. Florida, ____U.S.____(July 6, 1983).

GREGORY C. SMITH
Assistant Attorney General

Attorney of Record for Appellees

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STATEMENT OF THE ISSUES

ISSUE I

WHETHER THE DECISION OF THIS COURT ANNOUNCES A RULE IN DIRECT CONFLICT WITH THE UNITED STATES SUPREME COURT'S RECENT DECISION IN BARCLAY V. FLORIDA, _____U.S._____(July 6, 1983).

ISSUE II

WHETHER THE DECISION OF THIS COURT ADDRESSES AN AREA OF PROCEDURAL STATE LAW, WHICH, UNDER BARCLAY, IS NOT APPROPRIATELY PRESENTED AS A GROUND FOR FEDERAL HABEAS CORPUS RELIEF.

ISSUE III

WHETHER THE DECISION OF THIS COURT ENTERS INTO THE REALM OF DETERMINING THE WEIGHT AND SUFFICIENCY OF EVIDENCE PRESENTED IN MITIGATION, WHICH IS INAPPROPRIATE UNDER Eddings v. Oklahoma, 455 U.S. 104 (1982).

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

Appellant was found guilty of murder in the first degree and sentenced to death in Bay County, Florida. On direct appeal, the Florida Supreme Court affirmed the judgment and sentence. Foster v. State, 369 So.2d 928 (Fla. 1979). Petition for writ of certiorari was presented to the United States Supreme Court and was denied October 1, 1979.

After the Governor of Florida signed a death warrant requiring that appellant's sentence be carried out, appellant filed a motion for post-conviction relief in the trial court. The motion was denied May 15, 1981, and a direct appeal was taken to the Florida Supreme Court. On May 28, 1981, the Florida Supreme Court affirmed the trial court's ruling. Foster v. State, 400 So.2d 1 (Fla. 1981).

On May 26, 1981, a petition for habeas corpus relief was filed in the District Court of the Northern District of Florida. Appellant's execution was stayed pending an evidentiary hearing on the issue of effective assistance of counsel. An evidentiary hearing was held before the Honorable Lynn Higby, and on July 2, 1981, petitioner's prayer for relief was denied. Appeal to this court followed, and this court issued its opinion on July 27, 1983. This court reversed the sentence of death and remanded

the cause to the District Court so that the District Court could request the trial court enter findings of fact.

ARGUMENT

This court reversed the sentence of death on the ground that a Florida procedural rule had been violated. The opinion holds that because of the penalty involved; death, the state's procedural protection became cloaked with the status of a constitutionally protected right. By so deciding, this court has come into direct conflict with the United States Supreme Court's recent decision of Barclay v. Florida, _____U.S._____(July 6, 1983).

The procedural rule which this court determined was violated concerned the requirement of Florida law that the trial court make sufficient findings in imposing sentence of death. The Florida Supreme Court affirmed the judgment and sentence and stated:

> Although the findings of the trial judge in the case sub judice were not expansive, the justification of his sentence of death in writing was sufficient to show that the sentence of death resulted from reasoned judgment.

Foster, 369 So.2d, at 931, 932.

Specifically, the trial court's finding stated that

> [T]here are insufficient mitigating circumstances, . . . to outweigh the aggravating circumstances.

The majority opinion concluded that it is impossible to discern whether the trial court found no mitigating circumstances, or

whether he found mitigation which was insufficient to outweigh the aggravating circumstances.

In Barclay, petitioner asserted that the trial court's consideration of a nonstatutory aggravating circumstance, in violation of Florida law, mandated federal relief. While the Supreme Court found that a violation of state law had occurred, it nonetheless found that review of Barclay's death penalty was limited to whether the findings "are so unprincipled or arbitrary as to somehow violate the United States Constitution." The specific findings made by the trial court and affirmed on direct appeal by the Florida Supreme Court, were not subjected to a determination of whether they were supported by sufficient evidence, but rather the issue was whether the illegality so infected the balancing process that it was constitutionally impermissible for the Florida Supreme Court to let the sentence stand.

Barclay requires this court not enter into a determination of the sufficiency of the evidence. This court stated:

> [T]here is substantial evidence on the record that would have allowed the trial judge to impose a life sentence. . . .

To attempt an analysis of whether there was sufficient evidence presented to require the trial court to expressly mention the mitigating circumstance, is an analysis of the weight of the evidence which runs into direct conflict with Eddings v. Oklahoma, 455 U.S. 104 (1982).

In Eddings, the United States Supreme Court stated that the analysis of weight or sufficiency is a state court determination. "We do not weigh the evidence for them." Id. at 117. Both the trial court and the Florida Supreme Court found no mitigating circumstances to outweigh the aggravating circumstances. The fact that they mentioned that there were no mitigating circumstances to outweigh the aggravating circumstances gives rise to the presumption that mitigating circumstances were considered. In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Florida Supreme Court stated:

> In order to have weighed the aggravating circumstances against the mitigating circumstances, the court must have found some of the latter.

Id. at 1003.

However, whether the mitigating circumstances did not exist, or whether the trial court found that they were outweighed by the aggravating circumstances, is constitutionally irrelevant because under either alternative death was the appropriate penalty. Under this court's holding in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), the finding of no mitigating circumstances along with finding some aggravating circumstances allows the presumption that death is the appropriate penalty. Likewise, if as in Elledge, supra, mitigating circumstances are considered, but are found not to outweigh the aggravating circumstances, then the requirements of Lockett v. Ohio, 438 U.S. 586 (1978), are met and no error of constitutional dimension is presented.

Lastly, this court has addressed an issue never raised on appeal. The allegation that the trial court's order was insufficient under Florida law was mentioned in the petition for writ of habeas corpus, but appellant's appeal from the denial of that petition never addressed the issue of the propriety of the trial court's sentencing order. As a result, this court has reversed the death sentence imposed by a Florida court on an issue that was never presented on appeal before this court, and to which appellee has not had the opportunity to address until now.

The grounds upon which the opinion of this court decided the death sentence was inappropriate was abandoned by the failure to present that issue on appeal to this court.

CONCLUSION

This court is respectfully requested to rehear en banc the opinion filed in the above-styled cause for the reason that it conflicts with the holding of the United States Supreme Court in Barclay v. Florida. Further, the opinion of this court reversing the sentence of death addresses an issue which is purely a state procedural protection. As such, the court is "raising to a constitutional level an issue that is largely a matter of state law." (Dissent of Judge Roney.)

Further, by reversing the sentence of death, this court has delved into a determination of the sufficiency of the evidence

presented to the trial court in mitigation of sentence. Under Eddings v. Oklahoma, supra, that weighing process is reserved to the states.

JIM SMITH
Attorney General

By: _____
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COUNSEL FOR APPELLEES

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc to Mr. Steven L. Seliger, 222 W. Pensacola Street, Tallahassee, Florida 32301, by U.S. Mail, this 14th day of July, 1983.

_____
GREGORY C. SMITH
Assistant Attorney General

of Counsel